

Wausau Business Insurance asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's award of benefits to N. H. M. under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

On March 11, 2003, Mr. M. filed two claims for workers' compensation benefits related to his employment by Vermax. The first claim alleged injuries from an accident on May 14, 1998. On that date, Wausau was Vermax's workers' compensation insurance carrier. The second claim alleged an alternative date of injury of April 13, 2001. Workers Compensation Fund ("WCF") was Vermax's insurance carrier at that time.

Judge La Jeunesse held a hearing on Mr. M.'s claims on November 13, 2003, and then issued his decision on April 29, 2004. Judge La Jeunesse concluded Mr. M. was entitled to a preliminary determination of permanent total disability as a result of the injuries he suffered at work in May 1998. Judge La Jeunesse further concluded that Wausau, as the insurance carrier on the date of that accident, was liable for Mr. M.'s medical and disability benefits. Judge La Jeunesse ordered Wausau to file, within ten days, notice of its intent to submit a plan to rehabilitate Mr. M.. Judge La Jeunesse also ordered Wausau to begin paying subsistence benefits to Mr. M..

Wausau did not file the notice of intent as directed by Judge La Jeunesse. Consequently, on May 12, 2004, Judge La Jeunesse entered a final order awarding permanent total disability compensation to Mr. M..

Wausau now asks the Appeals Board to review Judge La Jeunesse's preliminary determination of April 29, 2004. Wausau argues that, although Mr. M. did injure his back in the May 1998 accident, it was the additional injuries he suffered in the second accident of April 2001 that caused his permanent disability. Thus, according to Wausau, WCF is liable for Mr. M.'s disability compensation. Wausau also argues that, even if it is liable for Mr. M.'s benefits, Judge La Jeunesse's order allowing only ten days to elect whether to submit a rehabilitation plan violates Labor Commission rules and is a denial of due process.

FINDINGS OF FACT

The Commission affirms and adopts Judge La Jeunesse's findings of fact. The facts relevant to Wausau's motion for review are summarized as follows.

Vermax employed Mr. M. as a cabinet maker and installer. On May 14, 1998, Mr. M. was lifting a countertop when he felt pain in his low back. He was unable to move. He used his cell phone to call his wife for help. She took him to WorkMed for medical care. Although Mr. M. was able to return to work after one day, he then relied on others to help him with required lifting. He

also continued to seek treatment for his low back which was becoming more and more painful.

On April 13, 2001, Mr. M. and a co-worker were lifting a cabinet when Mr. M. experienced increased pain in his low back and legs. Thereafter, Mr. M. stopped installing cabinets and limited himself to trim work. Nevertheless, his low back pain continued to grow worse. Mr. M. stopped work on August 28, 2001, and has not worked since.

As a result of the May 1998 accident, Mr. M. suffered a 7% whole person impairment from chronic and progressive low back pain radiating into the left leg, caused by a L4-5 disc protrusion. His subsequent work exertions on April 13, 2001, caused only a temporary aggravation, or “flare up,” of his already-existing back injury, but no additional permanent impairment.

DISCUSSION AND CONCLUSIONS OF LAW

Wausau does not dispute Judge La Jeunesse’s determination that Mr. M. has established a *prima facie* claim for permanent total disability compensation as a result of injuries suffered while working for Vermax. Instead, Wausau seeks to shift liability for payment of that disability compensation to WCF on the theory that Mr. M.’s disability results from his work at Vermax on April 13, 2001. On that date, WCF, and not Wausau, was Vermax’s insurance carrier.

The nature of Mr. M.’s back injuries, the progression of those injuries, and the causal contribution of various events to the development of the injuries are all medical questions that must be resolved from the medical evidence. Wausau’s theory that on April 13, 2001, Mr. M. suffered a permanent aggravation of preexisting injuries, and that this alleged aggravation is the cause of his permanent total disability, is not supported by the medical opinions the parties have submitted into evidence. To the contrary, the medical evidence establishes the work accident of May, 1998, as the cause of Mr. M.’s disabling back injury. As Vermax’s insurance carrier on that date, Wausau is therefore liable for Mr. M.’s ensuing medical and disability benefits.

The Appeals Board notes Wausau’s reference to the Labor Commissioner’s decision in DeMille v. Thurston Cable and Freemont Comp., Commission Case No. 00-1059, issued May 30, 2003. There, a worker with preexisting back injuries was involved in an accident at work. As a result of the work accident, the worker underwent surgeries and then suffered serious infection that required more surgery. All told, the worker had six surgeries, spent 10 months in the hospital, and was left with permanent scarring in his spine, muscle and soft tissue. Under those circumstances, the Commissioner concluded it was the work accident, rather than the preexisting condition, that caused the worker’s disability. Such circumstances are significantly different from those of Mr. M.’s situation, where the events at his work during April, 2001, temporarily aggravated his original work injury.

In light of the foregoing, the Appeals Board concludes that Mr. M.’s disability was caused by his work accident of May 1998. As Vermax’s insurance carrier on that date, Wausau is liable for such compensation.

The Appeals Board now turns to Wausau’s argument that Judge La Jeunesse violated Commission rules and Wausau’s right to due process by allowing only ten days for Wausau to elect whether it would submit a rehabilitation plan for Mr. M.. This issue can only be understood with

some background discussion of the Workers' Compensation Act's requirements for adjudicating claims for permanent total disability compensation.

An injured worker's right to permanent total disability compensation is governed by §34A-2-413 of the Workers' Compensation Act. First, the injured worker must meet each of the tests set out in §34A-2-413(1)(b) and (c). The injured worker is then entitled to a preliminary finding of permanent total disability and the employer/insurance carrier must begin paying subsistence benefits to the injured worker.

However, before a final award of permanent total disability compensation can be made, §34A-2-413(6)(a) requires: (i) the ALJ to review reemployment activities undertaken pursuant to the Utah Injured Worker Reemployment Act; (ii) the employer/insurance carrier to submit a plan to return the injured worker to gainful employment **or** notifies the ALJ that no such plan will be submitted; and (iii) the ALJ to hold a hearing to consider evidence regarding rehabilitation and to review the reemployment plan, if any is submitted. Then, pursuant to §34A-2-413(6)(e), if the ALJ concludes that successful rehabilitation is not possible, the ALJ will enter a final award of permanent total disability compensation on behalf of the injured worker.

Judge La Jeunesse correctly determined that Mr. M. had satisfied all requirements for a preliminary finding of permanent total disability. Consequently, Judge La Jeunesse's order of April 29, 2004, instructed Wausau to commence payment of subsistence benefits. The order also began the process of determining whether Mr. M. could be rehabilitated by requiring Wausau to elect within ten days whether it would submit a reemployment plan.

Wausau argues that the ten day period allowed by Judge La Jeunesse was so short as to violate the Commission's Rule 612-1-10.C.1(b), which provides as follows:

A party dissatisfied with the ALJ's preliminary determination may obtain additional agency review by either the Labor Commission or Appeals Board If a timely motion for review of the ALJ's preliminary determination is filed with either the Labor Commission or Appeals Board, no further adjudicative or enforcement proceedings shall take place pending a decision of the Commissioner or Board.

The foregoing rule does not address the length of time an employer should be allowed to decide whether to submit a reemployment plan. However, the rule clearly establishes that an ALJ's preliminary determination of permanent total disability is subject to review by either the Commissioner or Appeals Board. It appears that the ten-day period allowed in this case for Wausau to elect whether to submit a reemployment plan was so short as to impinge on Wausau's right to obtain review under Rule 612-1-10.C.1(b).

While the Appeals Board concludes that the ten-day time period allowed in this case was too short, the Appeals Board concurs with Judge La Jeunesse's effort to finally resolve Mr. M.'s claim with as little delay as possible. The Appeals Board suggests that in future cases like this, a 30 day time period would serve the purpose of a speedy resolution while not interfering with the operation of Rule 612-1-10.C.1(b).

As for this case, Wausau has now obtained review of Judge La Jeunesse's initial decision.

That decision is hereby affirmed with respect to its preliminary finding of permanent total disability. It is therefore necessary to move to the second step of considering whether Mr. M. can be rehabilitated and reemployed. To that end, the Appeals Board will allow Wausau 20 days from the date of this decision to notify Judge La Jeunesse whether it will submit a reemployment plan. If Wausau does not elect to submit a reemployment plan, Judge La Jeunesse may proceed to enter a final decision. On the other hand, if Wausau elects to submit a reemployment plan, the deadline for submitting the plan will be set by Judge La Jeunesse.

ORDER

The Appeals Board affirms Judge La Jeunesse's preliminary determination of April 29, 2004, that Mr. M. has established a prima facie claim to permanent total disability compensation. The Appeals Board sets aside Judge La Jeunesse's final order of May 2004, and remands this matter to Judge La Jeunesse for further proceedings consistent with this decision.

It is so ordered.

Dated this 31st day of January, 2005.

Colleen S. Colton, Chair
Patricia S. Drawe
Joseph E. Hatch